United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7478

United States Court of Appeals

For the Second Circuit

Docket No. 76-7478

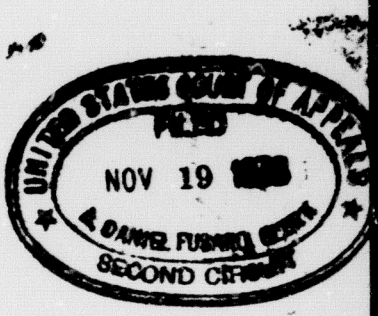
RANDALL BLACK, *et al.*,

Plaintiffs-Appellants,

– against–

ABRAHAM BEAME, *et al.*,

Defendants-Appellees.



Appeal from the United States District Court for the Southern District of New York

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

Plaintiffs appeal from an order entered in the Southern District on September 1, 1976, dismissing their complaint in this civil rights action. The core of plaintiffs' pleading lies in the contention that defendant state and city officials have provided them with child welfare services in a manner designed to maximize rather than minimize the disruption of their nuclear family. Judge Pollack held that these allegations failed to state a claim for relief and that defendants furthermore are under no obligation, either constitutional or statutory, to pursue less drastic means before directly and substantially interfering with plaintiffs' fundamental right to family integrity. Plaintiffs respectfully submit that this ruling was in error and that the decision of the district court must accordingly be reversed.

QUESTIONS PRESENTED

1. Whether the district court erred in dismissing as insubstantial plaintiffs' claim that defendant state and city officials must first explore less restrictive alternatives before providing child welfare services in a manner which predictably and severely impinges upon plaintiffs' constitutionally protected right to family integrity?

2. Whether the district court erred in refusing to consider if defendants' failure to respect and protect plaintiffs' right to family integrity is inconsistent with the goals expressed and obligations imposed by the controlling provisions of the federal Social Security Act?

3. Whether the district court was correct in its conclusion that the Due Process Clause of the United State Constitution affords plaintiffs no protection against the undue delay and harassment which they and their mother have encountered in their effort to obtain appropriate services?

STATEMENT OF THE CASE

The following facts are contained in plaintiffs' complaint and supporting papers. For purposes of this appeal from the granting of a motion to dismiss, these facts must, of course, be accepted as true. See e.g. Scheuer v. Rhodes, 416 U.S. 232,236 (1974); Build of Buffalo v. Sedita, 441 F.2d 284, 287 (2d Cir. 1971).

This action was begun on behalf of nine young brothers and sisters: Kim, Randall, Janice, Greta, Joseph, Corrine, Nathaniel, Ulysses and Geraldine Black. Together with their mother, Frances Black, they have waged a long and only partially successful battle to keep their family together under increasingly difficult circumstances. At every turn, they have been impeded in this effort by defendant officials who have responded to their problems with a mixture of active resistance, passive indifference and counter-productive assistance.

Since at least 1968, defendants have been aware of the fact that plaintiffs required supportive services if they were to survive as a family. At the time, the Blacks were living in a rundown, two bedroom apartment in upper Manhattan. Despite its obvious inadequancy, both in size and condition,[1/] plaintiffs were unable to move because they lacked the money to do so.

1/ In 1969, Frances Black and her son Ulysses, then three years old, were bitten by mice which infested their apartment.

Ms. Black was then, as now, receiving AFDC benefits.[2/]

Anxious about the well-being of her family, Ms. Black sought the aid of housing and welfare authorities in securing a more suitable home. Her concern was not, however, matched by the public officials she approached and her pleas went unheeded until she participated with plaintiffs in a public demonstration for better housing. Shortly thereafter, she was finally granted a three bedroom apartment in a public housing project at 870 Columbus Avenue in New York City.

Even when notifying her of its availability, defendants candidly conceded that, in terms of additional space, it represented only a slight improvement over where plaintiffs have lived previously. So, concurrently, they promised her a six bedroom apartment in another housing project as soon as one became available. That promise was never fulfilled although Ms. Black repeatedly informed defendants throughout the next two years of the mounting tensions resulting from living in such cramped quarters and of her declining ability to deal effectively with them due to her deteriorating health. Defendants' only response to this clearly burgeoning crisis was, in 1970, to move plaintiffs and their mother into a four bedroom apartment in the same housing project. Defendants never offered, and plaintiffs never received, any form of counseling or other in-home services to relieve Ms. Black's burden or to enable the family to more easily cope with the situation at home.

2/ Aid to Families with Dependent Children is, as the name implies, a welfare program intended to assist needy children and funded in large part by the federal government under the provisions of the Social Security Act, 42 U.S.C. §§601 et seq.

Thus denied any outside support, Ms. Black became increasingly despondent over her ability to withstand the pressure of bringing up her children in a house far too small for their needs. Desperate and depressed, in January 1971,she reluctantly asked the New York City Bureau of Child Welfare to assume responsibility for plaintiffs Randall, Greta, Joseph and Corrine. The Bureau of Child Welfare responded by sending these children to a child-care institution. For Ms. Black, this was the last resort, a step which she could convince herself to take only because she believed, and was told, that it would be a temporary one. Immediately, she began to look for a job, hoping that with the money she earned she could obtain a larger apartment and quickly reunite her whole family again. As events have developed, this hope was an illusory one.

Had she know of any other alternative, Ms. Black would never have agreed to split up her family and Randall, Greta, Joseph and Corrine would not have been deprived of the direct care and supervision of their own mother. Over and again, Ms. Black expressed these sentiments to anyone who would listen - to housing officials, welfare officials and to officials of the Bureau of Child Welfare who accepted custody of her four children. Yet no one indicated to her that programs in fact existed to help families overcome periods of difficulty and adjustment. This bureaucratic bias in favor of foster care placement is unfortunately typical. For all its typicality, it is nonetheless inexplicable in view of the defendants' often pronounced goal of promoting and supporting family life.

The range of services which might usefully have been provided to plaintiffs and their mother is suggested by the affidavit

of Sarah Zweibel.[3/] Ms. Zweibel is a New York State certified social worker currently employed as an assistant professor at the Adelphi University School of Social Work. In that capacity, she has spent the past year training a group of undergraduate and graduate students whose assignment was to assist families recovering from incidents of child abuse or maltreatment. Previously, she worked as a psychiatric social worker at Brookdale and Hillside Hospitals, and as an Assistant to the Commissioner of Special Services for Children for Community Based Services. Her principal responsibility in that latter post was as a liason between the city on one hand, and voluntary child-care agencies and community groups on the other, in an effort to develop placement prevention programs as well as community-based placement facilities.

Because of her extensive experience in dealing with families in crisis, and her thorough knowledge of the services available short of foster care, plaintiffs counsel asked Professor Zweibel to interview Ms. Black and independently assess her needs and those of her children. After visiting with the family on two separate occasions for a total of four hours, Professor Zweibel developed a comprehensive service plan which, if implemented, might well have averted, and had averted in other similar cases, the need for foster care placement.

Its principal ingredient was the assignment of a family social worker whose specific task would be to aid Ms. Black in locating a new home, enrolling her younger children in new schools, finding jobs for herself and her older children, and generally in

3/A copy of her affidavit, which was introduced in camera below, is annexed hereto as Exhibit A.

dealing with the "many bureaucratic systems on which [she is] dependent." Professor Zweibel moreover recommended that homemaker services be provided to further help insure that plaintiffs and their mother would not be overwhelmed by these sudden changes in their lives. In conclusion, she stated: "When one considers how inexpensive all of the above would be in comparison to the cost of foster care for all children currently in placement, one can only be dismayed that no such plan was effected four years ago."

None of these possibilities was ever mentioned or explored by the defendants, who instead simply placed plaintiffs Randall, Greta, Joseph and Corrine in the Mission of the Immaculate Virgin ("MIV"), 4/ a large child-care institution on Staten Island housing approximately seven hundred children in dormitory-like settings. All are still there to this day, although from the very outset each has complained about his or her institutional confinement and asked to be returned to their mother, brothers and sisters. These feelings are shared by the rest of the family and Ms. Black has persisted in vain in her attempt to obtain appropriate services and to regain the four children she never wanted to lose in the first place.

Rather than encouraging and supporting her in these efforts, defendants have reacted to every plea for assistance as though it were a burdensome inconvenience undertaken only for

4/ The Mission of the Immaculate Virgin is an authorized child-care agency which provides child-care services to New York City children. At the time plaintiffs first entered MIV, it was subject to the supervision of the Bureau of Child Welfare. Following a recent bureaucratic reorganization, it is now subject to the supervision of Special Services for Children, a division of the New York City Human Resources Administration.

purposes of harassment. They have humiliated and intimidated Ms. Black for simply trying to gather her family under one roof again. They have subjected her requests for housing benefits and child welfare services to unnecessary confusion, mishap and delay. Indeed, defendants Dumpson, Parry and Fogarty, acting through their agents, have refused to provide help even when ordered by the New York Family Court to assist Ms. Black in finding a suitable home so that Randall, Greta, Joseph and Corrine could be removed from MIV as soon as was possible.

Defendants unbending attitude has understandably placed yet an additional stress upon the already precarious condition of Ms. Black and those plaintiffs still living with her. Ms. Black's health has declined as a result and that, plus the innumerable administrative hearings which she has been forced to attend, caused her to miss so many days from work that in March,1975,she was dismissed from the job at the New York Telephone Company which she had held for four years as part of her plan to reunite all her children.

Seizing upon the human destruction which their own actions have either precipitated or failed to alleviate, defendants have recently threatened legal proceedings to remove the remaining plaintiffs from Ms. Black's care and custody. Plaintiffs Kim, Janice, Nathaniel, Ulysses and Geraldine do not want to go into foster care. They are outspoken in their desire to stay with each other and with their mother. But based upon past performance, they have no reason to expect that they will receive any affirmative, programmatic support from any of the defendants. None has been forthcoming in the past; none is likely to be forthcoming in the future. Defendants' entire emphasis was and is on hastening the

dissolution rather than promoting the reconstruction of the Black family.

In his opinion of August 30, 1976, Judge Pollack ruled that this policy and practice is consistent with defendants' constitutional and statutory duty. Plaintiffs respectfully disagree.

POINT I

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIM TO CHILD WELFARE SERVICES IN A MANNER LEAST RESTRICTIVE OF THEIR FUNDAMENTAL RIGHT TO FAMILY INTEGRITY

The United States Constitution guarantees all children, including plaintiffs, the right to grow up in their own home with their own brothers and sisters under the direct care and supervision of their own parents. See Meyer v. Nebraska, 262 U.S. 390,401-402 (1923). That right is not absolute but it is fundamental, as the district court clearly recognized in its opinion below. By dismissing plaintiffs' complaint for failure to state a claim for relief, Judge Pollack issued defendants a carte blanche to structure and operate the child welfare system without regard to its consequences upon plaintiffs' protected family relationships. His ruling furthermore excuses defendants from the obligation of even exploring the possibility of less restrictive alternatives.

In theory and in practice, the unlimited authority thus granted state officials is inconsistent with the privileged position of the nuclear family. Once defendants responded to Ms. Black's request to assume responsibility for four of her children,[5/] they had a constitutional obligation to exercise that responsibility in a manner least likely to interfere with plaintiffs' fundamental right to family intergrity: that is, by doing everything possible to see that plaintiffs' family remained intact, or, at the least, was quickly reunited. Instead of acting in a way

5/ The issue is not whether defendants have an obligation to provide services for plaintiffs but whether, having chosen to provide services, the Constitution limits the manner in which those services may be provided.

least restrictive of plaintiffs' liberty and least disruptive of their family, defendants acted in the most restrictive and disruptive manner possible: that is, they institutionalized Greta, Randall, Corrine and Joseph, and have allowed them to remain institutionalized for the last 4 1/2 years.[6/]

A series of cases spanning more than fifty years has firmly established the rule that the state must tread carefully before intruding upon or interfering with the family domain. See Alsager v. District Court, 406 F.Supp. 10,15-16 (S.D. Iowa 1975). It it acts, it must do so with restraint and then only when prompted by the most compelling of circumstances. Cf. Shapiro v. Thompson, 394 U.S. 618 (1969).

Writing for the majority in Stanley v. Illinois, 405 U.S. 645,651 (1972), Justice White summarized the constitutional protection long accorded the family in striking down a statute which conclusively presumed that every unwed father was unfit to bring up his child:

> The [Supreme] Court has frequently emphasized the importance of the family. The rights to conceive and raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390,399, 67 L.Ed. 1042, 1045, 43 S.Ct. 625, 29 ALR 1446 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535,541, 86 L.Ed. 1655,1660, 62 S.Ct. 1110 (1942), and [r]ights far more precious ... than property rights," May v. Anderson, 345 U.S. 528,533, 97 L.Ed. 1221,1226, 73

6/ Similarly, the five plaintiffs who are in jeopardy of foster care placement, Kim, Janice, Nathaniel, Ulysses and Geraldine, are children for whom the state is already responsible, pursuant to New York Social Services Law §395 and by virtue of the federal Aid to Dependent Children program.

> S. Ct. 840 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder," Prince v. Massachusetts, 321 U.S. 158, 166, 88 L.Ed. 645, 652, 64 S.Ct. 438 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, 67 L.Ed. at 1045, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, 86 L.Ed. at 1660, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496, 14 L.Ed.2d 510, 522, 85 S.Ct. 1678 (1965)(Goldberg J., concurring).

In the earliest cases, this constitutional deference was most often based upon what was generally labelled as the parents' natural law right to "marry, establish a home, and bring up children." Meyer v. Nebraska, supra, at 399; Pierce v. Society of Sisters, 268 U.S. 510 (1925). More recently, the focus has been upon the need to preserve the intimacy of family life, leading to the unmistakable emergence of the right to familial privacy, see e.g. Paris Adult Theater v. Slaton, 413 U.S. 49, 66 n. 13 (1973); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, supra, a right which embraces children as well as parents within the scope of its protection.

In this regard, as in others, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," In re Gault, 387 U.S. 1, 13 (1967). Indeed, if anything, a child's greater vulnerability, dependency and lack of alternative supports, magnifies the need to view the family as a sanctuary. Summarizing this conceptual evolution with succinctness, Judge Weinfeld has noted:

> ...Roe v. Wade leaves no room for doubt that a "fundamental" right to freedom of and privacy in family life exists, whether derived from the

> First, Ninth or Fourteenth Amendments, or some combination thereof. That children have same right as adults to freedom of, and privacy in, family life is abundantly clear from In re Gault. [footnotes omitted].

Child v. Beame, 412 F. Supp. 593, 602 (S.D.N.Y. 1976).

Plaintiffs have been effectively frustrated in the exercise of this fundamental right by defendants' unwillingness to provide them with the supportive services they require, which they or their mother have requested, and which the defendants have at their disposal.[7/] Rather than assist in the stabilization the Black family, defendants have been content to passively stand by and observe with apparent equanimity its progressive and disheartening disintegration. Already, four of the Black children have been placed in institutions and others may very well follow in the near future.

This is not, of course, to say that defendants are responsible for all or even most of the problems which the Black family has experienced. Plaintiffs have never made and do not now make any such allegation. But, the fact remains that New York State has constructed an elaborate child welfare system precisely for the purpose of aiding troubled families to overcome periods of personal or economic crisis. Whether or not it was under the obligation to do so is now beside the point. Once having chosen

7/ The New York State Legislature has moreover expressed its intention that supportive services be provided where and when necessary "in the light of...particular home conditions." New York Social Services Law §§344(1); 407(1). A recently enacted provision specifically authorizes psychiatric, psychological, social casework, health, transportation and other preventive services to avert the disruption or facilitate the reunion of family units. Ch. 906, New York Session Laws (1976) (effective April 1, 1977).

to act, the state and its agents must behave in a manner least likely to burden constitutional rights.

This bedrock principle of constitutional law is well illustrated by the Court's opinion in Dunn v. Blumstein, 405 U.S. 330 (1972), invalidating a durational residency requirement imposed by Tennessee as a pre-condition to voting in state elections. In language equally apposite to the facts of this case, the Court held:

> It is not sufficient for the State to show that durational residence requirements further a very substantital interest. In pursuing that important interest, the State cannot choose means that uncessarily burden or restrict constitutionally protected activity ... And if there are other, reasonable ways to achieve [its] goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all it must choose "less drastic means." 405 U.S. at 343 [Emphasis added]. 8/

Defendants herein have plainly failed to adhere to this constitutional injunction, while all the time proclaiming the unique and irreplaceable attributes of the natural family. No one disputes New York substantial and legitimate interest in the maintanence of its child welfare system. The issue is not if, but how, that system should be maintained. By refusing to provide necessary supportive services for Ms. Black and her children, defendants have virtually insured, and events have shown, that the Black family will be unable to survive intact.

Misinterpreting the decision in Dandridge v. Williams, 397 U.S. 471 (1970), Judge Pollack concluded that the doctrine of less restrictive alternatives has no application to defendants'

8/ It is of no constitutional import that defendants' actions in the present case were based upon a custom, pattern and practice rather than a specific statutory mandate.

administration of the child welfare system. In Dandridge, the sole question was whether the state might permissibly impose a ceiling upon the maximum benefits which any one family could receive under AFDC. Although ruling that it could, and that the state must be allowed a certain latitude in ordering its fiscal priorities, the Supreme Court carefully qualified its holding by specifically noting that "we deal [today] with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights," 397 U.S. at 484. As Justice Stewart then pointed out in a pivotal footnote, an opposite result was reached in Shapiro v. Thompson, 394 U.S. 618 (1969), "where, by contrast, the Court found state interference with the constitutionally protected freedom of travel," 397 U.S. at 484 n. 16. This essential distinction, depending upon the nature of the right involved, was simply ignored by the district court's opinion below.

Here, the fundamental right of family integrity is at stake and the leeway normally granted state authorities must accordingly be subject to the most rigorous scrutiny. The case upon which the district court should have relied, but which it expressly rejected, is Shelton v. Tucker, 364 U.S. 479 (1960). Shelton involved a challenged to an Arkansas law requiring any teacher who wished to be rehired to submit an annual affidavit listing every organization to which he or she belonged or had paid dues within the previous five years. Focusing on the statute's chilling effect upon the freedom of association, the Supreme Court held:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly

> stifle fundamental personal liberties where the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose. Id. at 488.

Judge Pollack could not and did not deny that this principle, if applied to defendants' conduct, would require that they provide Ms. Black and her family with the supportive services which have so far been withheld. Rather, he announced that the doctrine of less restrictive alternatives is limited in its application to First Amendment cases involving freedom of speech and also to the area of civil commitment.

This holding is simply and demonstrably incorrect. The reasoning of the cases to which Judge Pollack referred makes it clear that the doctrine is not so circumscribed but is instead to be applied whenever fundamental rights are at stake. In fact, the test enunciated in Shelton has been repeatedly employed "in a variety of contexts," Chicago Police Department v. Mosley, 408 U.S. 92, 101 n. 8 (1972). See also, Aptheker v. Secretary of State, 378 U.S. 500 (1964). See generally, Wormuth & Mirkin, "The Doctrine of the Reasonable Alternative," 9 Utah L.R. 254 (1964), and cases collected therein; also, "The Less Restrictive Alternative in Constitutional Adjudication," 27 Vand. L.R. 971 (1974).

Indeed, Meyer v. Nebraska, supra, the decision generally acknowledged as the first to articulate the value of family life and to recognize the existence of familial rights, had forty years earlier expressed remarkably similar sentiments. Yet Meyer was

indisputably not a classic First Amendment case. It was based at the time upon the then prevailing notions of substantive due process and, with the demise of the Lochner era,[9/] has subsequently been reinterpreted into one of the generative right to privacy opinions.

In striking down a Nebraska statute which forbade the teaching of any foreign language to a student who had not yet completed the eighth grade, the Court stressed that it would have no objection to reasonable state regulation short of absolute prohibition. But, it added: "No emergency has arisen which renders knowledge of some language other than English so clearly harmful as to justify its inhibition, with the consequent infringement of rights long freely enjoyed," 262 U.S. at 403. In short, "the desire of the legislature to foster a homogeneous people with American ideals," 262 U.S. at 402, should have and could have been pursued by less drastic means.

Two years later, the Supreme Court relied upon Meyer in declaring unconstitutional an Oregon law which required every child between the ages of eight and sixteen to attend a public school. Pierce v. Society of Sisters, 268 U.S. 510 (1925). The suit was brought by a religious organization which had long maintained a private, sectarian academy and which willingly submitted to inspection and supervision but contested the power of the state

9/ The philosophy of Lochner v. New York, 198 U.S. 45 (1905), the fountainhead of substantive due process, was expressly rejected by the Supreme Court in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

to totally monopolize the educational arena. The Court agreed, deeming it plain that "the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id at 534-535. Accordingly, it held that the "extradordinary measure" which the state had enacted, in contrast to less restrictive alternatives which were readily available, could not be sustained absent "peculiar circumstances or present emergencies" which were not indicated in the record before it. Id. at 534. The First Amendment was never mentioned in the opinion .

Similar concerns are evident in Griswold v. Connecticut, 381 U.S. 479 (1965), which involved an attack upon a Connecticut statute outlawing the use of contraceptive devices, even among married adults. Although the Court based its decision in part upon the penumbral emanations of the First Amendment, it certainly was not the traditional case of freedom of speech or expression which Judge Pollack apparently had in mind in limiting the reach of the less restrictive alternative doctrine. Nonetheless Justice Douglas described the issues before the Court in the following terms:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand... Id. at 485.

The relevance of this language to the facts at hand is obvious, and is furthermore underlined by the concurring opinions of Justices Goldberg and White which refer even more explicitly to the standards enunciated in Shelton v. Tucker, supra. 381 U.S. at 503-504.

Finally, in Roe v. Wade, 410 U.S. 113 (1973), the Court upheld the constitutional right of a woman to have an abortion during the first two trimesters of pregnancy, ruling that any legislative enactment touching upon that right "must be narrowly drawn to express only the legitimate state interests at stake," id. at 155 . Defendants conduct in this case, though undertaken as a part of their general discretionary authority, rather than as a result of a specific statutory mandate, must at the least be subject to the same rigorous review.

Following the lead of the Supreme Court, the lower federal courts have never hesitated to apply the less restrictive alternative test to areas outside the realm of the First Amendment. Thus, in Lessard v. Schmidt,[10/] a three judge court held that officials who recommended hospitalization for individuals suffering from mental illness were required by the Due Process Clause to first,

> bear the burden of proving (1) what alternatives are available; (2) what alternatives were investigated; and (3) why the investigated alternatives were not deemed suitable. 349 F. Supp. at 109.

Accord, Covington v. Harris, 419 F. 2d. 617, 624-625 (D.C. Cir. (1969) (en banc); Wyatt v. Stickney, 344 F. Supp. 373,384 (M.D. Ala. 1972), affd. sub nom. Wyatt v. Aderholt, 503 F.2d 1305

10/ 349 F.Supp. 1078 (E.D. Wis. 1972)(three judge court), vacated and remanded on other grounds, 414 U.S. 473 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974)(three judge court), vacated 421 U.S. 957 (1975).

(5th Cir. 1974), Welsch v. Likens, 373 F.Supp. 487,502 (D. Minn. 1974).[11] This Circuit has, in addition, expressly applied the least restrictive alternative doctrine to individuals confined while awaiting trial on criminal charges. Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974), affirming in pertinent part, 371 F. Supp. 594 (S.D.N.Y. 1974).

The thrust of these cases is clear: the least restrictive alternative doctrine operates as a general constraint upon governmental action whenever fundamental rights are infringed. Aptheker v. Secretary of State, supra, (government must explore the possibility of less restrictive alternatives before too broadly burde ing the Fifth Amendment right to travel abroad). It has never been, and should not be, limited in its application to the protection of only First Amendment free speech values.[12]

11/ The district court simply dismissed out of hand this long line of authority dealing with civil commitment on the ground that it all was factually distinguishable from plaintiffs' institutionalization in a large child-care facility. Plaintiffs never purported to be making an exact analogy but only to be demonstrating that the scope of the doctrine announced in Shelton v. Tucker extends beyond the limits of the First Amendment.

12/ And even if it were so limited, the rights of familial privacy and integrity have substantial roots in the First Amendment. See Griswold v. Connecticut, supra. The district court presented no reason, and none is apparent, for distinguishing between and among various First Amendment rights.

If a catalogue of judicial opinions in this area reveals that many, and perhaps most, arise out of First Amendment controversies, it is solely because the First Amendment is the repository of so many of our most cherished freedoms. It is not, however, the exclusive source of our fundamental and constitutionally guaranteed rights. In failing to perceive this distinction, Judge Pollack confused a frequent illustration of the principle of utilizing less drastic means with the underlying and more expansive, principle itself.

In the present case, the argument that defendants were and are constitutionally obliged to provide the supportive services which plaintiffs have been and still are requesting, is all the more compelling in the absence of any countervailing interest on the other side. Defendants have not and cannot deny that the ultimate end of the child welfare system they administer is the return of every child, whenever feasible, to his or her nuclear family. The societal judgment embodied in that goal is obvious and uncontestable. The benefits to be gained from growing up within the context of one's own family are manifest and not easily duplicated elsewhere. This perception lies at the heart of the constitutional guarantee of family integrity. It moreover demands that every effort be made to keep families intact in the first instance and, where that option is no longer available, to reunite them again at the earliest possible moment. As a matter of constitutional duty, and also sound social policy, defendants cannot possibly justify their persistent refusal to grant plaintiffs the assistance they require and seek.

The result of their actions has been to make the child welfare system a far costlier one to operate, whether that cost

is gauged in human or fiscal terms. With the proper supportive services, Randall, Greta, Joseph and Corrine might well have avoided the trauma of removal from their home and the progressive alienation which being institutionalized has inevitably caused. The remaining Black children might never, in turn, have been separated from their brothers and sisters or forced to fear that they too might eventually be placed in foster care. Of course, there is no guarantee that supportive services could have helped in the past, or could help any longer. But such services would undeniably represent a less drastic response than the government has yet displayed to the troubles encountered by a single family trying, but unable on its own, to remain together.

Defendants cannot even, as they so often do, attempt to justify their actions in this case upon a claimed lack of financial resources. Over the years, a great deal of money would have been saved had plaintiffs been provided with in-home services rather than being rushed into a large institution.[13/]

Alth the figures have changed over time, the extraordinary expense of institutionalization was recognized by Family Court Judge William Rigler when he ordered the city defendants

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13/ During the course of oral argument, appellants' counsel pointed out to the court that approximately $250,000 had already been expended on foster care for the four plaintiffs at MIV. See "In the Child's Best Interest," An Examination of New York City's Child Welfare System, November 1971, Fund for the City of New York.

and defendant Fogarty to aid plaintiffs' family in finding adequate housing so that Randall, Greta, Joseph and Corrine could be returned from MIV:

> "It's costing $140.00 a day to keep the kids here for two days. She [plaintiffs' mother] could have a house for a whole month...Let's not be penny wise and pound foolish because it is our pounds that are going down the drain. 14/

It is important to emphasize that plaintiffs' request is a modest one. The supportive services which they need are well within defendants' capacity to provide. The means are there if defendants only want to utilize them. It is not a question of subsidization; defendants are already providing for the cost of plaintiffs' care. But in doing so they have not employed the least drastic means available to them. Instead, the actions they have taken and, more importantly, those which they have refused to take, have combined together to make a mockery of plaintiffs' fundamental right to family integrity and have acted to accelerate, if anything, the breakup of plaintiffs' home. Should the facts as stated in their pleading be proved at trial, plaintiffs would therefore be entitled to relief. Under these circumstances, the district court erred in dismissing their complaint. Conley v. Gibson, 355 U.S. 41, 45-45 (1957).

14/ Transcript, p. 12, In the Matter of Randall, Greta, Joseph and Corrine Black, k2585-88/73, New York County Family Court June 26, 1973.

POINT II

THE DISTRICT COURT ERRED IN REFUSING TO CONSIDER PLAINTIFFS' STATUTORY CLAIM TO SUPPORTIVE SERVICES

The Supreme Court has repeatedly held that states choosing to participate in the federal program of Aid to Families with Dependent Children, 42 U.S.C. § 601 et seq., may not undermine the goals which that program embodies through either their regulations or practices. See Philbrook v. Glodgett, 421 U.S. 707 (1975); Shea v. Vialpando, 416 U.S. 251 (1974); Carleson v. Remillard, 406 U.S. 598 (1972); Townsend v. Swank, 404 U.S. 282 (1971); Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968). Defendants' unexplained failure to provide plaintiffs with necessary supportive services has had precisely that effect.

The AFDC program was enacted by Congress in 1935 as an integral part of the first Social Security Act. As stated in its opening provision, it was expressly designed "to help maintain and strengthen family life," 42 U.S.C. § 601. See Ramos v. Montgomery, 313 F.Supp. 1179, 1181 (S.D.Cal. 1970)(three judge court), affd. 400 U.S. 1003 (1971). Its overriding aim was, and still is, "to keep...young children with their mother in their own home, thus preventing the necessity of placing [those] children in an institution." S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935).

Defendants' conduct in this case can only be characterized as proceeding in the totally opposite direction. Although

financed in large part by funds made available through AFDC, they have consistently refused to support in any way the efforts of the Black family to remain together. As a predictable consequence of their refusal, four of the palintiffs have been institutionalized for over five years and the prospects are now exceedingly slight that they will be released until they reach their majority. This situation is more than a matter for simple regret; it reflects defendants' absolute disregard of the aims espoused and obligations imposed by the federal statute under which they are bound.

These obligations have been partially defined, and the principles underlying them completely accepted, by the defendants themselves. In order to qualify for reimbursement under AFDC, New York was required to submit to the Department of Health, Education and Welfare a plan indicating its intention to develop a program for strengthening, where appropriate, the family life of dependent children receiving aid, 42 U.S.C. §602(a)(15).[15/] To suppose that Congress was indifferent, or that the courts should ignore, whether that plan is ever implemented, would be to convert §602(a)(15) into "a futile, hollow, and, indeed, a deceptive gesture. . ." Rosado v. Wyamn, supra, 397 U.S. at 415.

Nothing in the language, logic or legislative history

15/ The state must also include in its plan provision for services designed to improve the conditions in the home from which [any child has been] removed or to otherwise make possible his being placed in the home of a relative. . . 42 U.S.C. §608(f)(1). See also, 45 C.F.R. §233, 110(a)(2)(iii).

of § 602(a)(15) warrants such an interpretation. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed," Lau v. Nichols, 414 U.S. 563, 569 (1974). And while this particular subsection has never been authoritatively construed, similar attempts to distort the plain meaning of the parallel requirement that "aid be furnished with reasonable promptness to all eligible individuals," 42 U.S.C. § 602(a)(10), have been uniformly rejected. Philbrook v. Glodgett, supra; Shea v. Vialpando, supra; Townsend v. Swank, supra; King v. Smith, supra.

In addition, and for like reasons, defendants' actions have been inconsistent with the purposes and provisions of Title XX of the Social Security Act, 42 U.S.C. § 1397. Intended to augment the coverage of AFDC, Title XX authorizes federal grants on a matching fund basis to any state willing to furnish family services in an effort to promote the following goals:

> ...(3) preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests, or preserving, rehabilitating or reuniting families; (4) preventing or reducing inappropriate institutional care by providing for community-based care, home-based care or other forms of less intensive care...16/

Not surprisingly, New York has applied for this money as well, prominently listing among the services which it planned to provide one simply labelled as "Home Improvement."

16/ Title IV-B of the Social Security Act, 42 U.S.C. § 620, et seq., also contains provisions relating to "child welfare services," a phrase which it too broadly defines as embracing programs directed toward "protecting and promoting the welfare of children including the strengthening of their own homes where possible." 42 U.S.C. § 625.

This was explained as: "Assessing the need for, arranging for, and evaluating the provision of, help for families and individuals to obtain or retain adequate housing in order to improve family living."[17/] It is, of course, impossible to think of a more accurate description of the services which plaintiffs have repeatedly sought, both before and after New York's application was filed, and which defendants have thus far been unwilling to supply.

New York should not, in its endeavor to obtain federal funds, be permitted to represent to the federal government that it will provide services which lie at the heart of the Congressional program but which, in practice, are unavailable. To insure that this does not occur, the federal courts, as well as HEW, have been given important oversight responsibility. As stated by Justice Harlan in Rosado v. Wyman, supra, 397 U.S. at 420:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off funds for non-compliance with statutory requirements. We are most reluctant to assume Congress has closed the avenues of effective judicial review to those individuals most directly affected by the administration of its program. [Citations omitted] We adhere to King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be to curtail judicial relief. . .

17/ Summary of Proposed Comprehensive Annual Social Services Program Plan for New York State, October 1, 1975, to September 30, 1976, p. vii-16.

Nonetheless, Judge Pollack refused to even address any of the statutory arguments which plaintiffs have raised. Instead, the court compounded its error in improperly dismissing plaintiffs' constitutional claim by declining to consider whether plaintiffs were entitled to the services they seek under the Social Security Act.

It is instructive to review in full the standard which the court purported to apply in reaching its determination that plaintiffs' constitutional claims were too insubstantial to justify the exercise of its pendent jurisdiction.

> "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," Bailey v. Patterson, 369 U.S. at 33; "wholly insubstantial," ibid; "obviously frivolous," Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288; and "obviously without merit," Ex Parte Poresky, 290 U.S. 30, 32. The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281. A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that questions sought to be raised can be the subject of controversy. . .

Hagans v. Lavine, 415 U.S. 528, 537-583 (1974), quoting from Goosby v. Osser, 409 U.S. 512, 518 (1973).

No matter what the final decision on plaintiffs' asserted right to child welfare services in a manner least restrictive of their family integrity, the claim itself cannot possibly be described as "inescapably. . . frivolous" or

"clearly. . . foreclosed." See Point I, supra. Since the district court's predicate was so plainly incorrect, its conclusion cannot be allowed to stand, especially since it constitutes such a drastic departure from this Circuit's "liberal application of the doctrine of pendent jurisdiction." Aguayo v. Richardson, 473 F.2d 1090, 1102 (2d Cir. 1973), cert denied, 414 U.S. 1146 (1974).

Moreover, in citing Hagans and Goosby, Judge Pollack relied and then misapplied a standard initially formulated to aid in resolving the far different issue of when and if to convene a three judge court. Significantly, Judge Pollack never referred to United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the Supreme Court opinion setting forth with specificity the relevant criteria for pendent jurisdiction. Had he done so, he would undoubtedly have reached a contrary result. Clearly plaintiffs' statutory and constitutional claims "derive from a common nucleus of operative fact," id. at 725. And where the statutory question is one "of federal policy. . .the argument for exercise of pendent jurisdiction is particularly strong," id at 727. See also Rosado v. Wyman, supra, 397 U.S. at 403-405. "Under the circumstances it [is] absurd to fragmentize this litigation, especially when. . . all the claims are federal in nature," Aguayo v. Richardson, supra, 473 F.2d at 1102.[18/]

18/ In their complaint, plaintiffs did assert that defendants actions were also in violation of certain state law provisions. Should this Court remand for consideration of plaintiffs' federal statutory claims, judicial economy would strongly suggest that the district court be directed to hear the entire case in all its closely related aspects at the same time.

Finally, and most importantly, in focusing so intently upon the question of pendent jurisdiction, the district court simply overlooked the allegation in plaintiffs' complaint that more than $10,000 is in controversy between the parties. Jurisdiction was therefore proper in any event over all the federal claims, both constitutional and statutory, under 28 U.S.C. §1331.

Plaintiffs concede a certain ambiguity in the wording of their complaint, and that it could conceivably be read as tying the $10,000 figure only to the claim of constitutional infringement contained in the sentence immediately preceding it. Such a reading would, however, make no sense since constitutional claims can be heard in federal court without regard to any threshold amount in controversy. 28 U.S.C. §1343. Furthermore, if the value of the constitutional claim exceeds $10,000, the value of the statutory claim must also, of necessity, exceed that sum since both relate to the same request for supportive services.

The entire thrust of modern federal procedure demands that complaints not be dismissed upon grammatical technicalities or the niceties of pleading. Just the opposite is true and the rule is well-settled that during the early phases of litigation the complaint must "be liberally construed in favor of plaintiff[s]," Jenkins v. McKerthern, 395 U.S. 411, 422 (1969). This was not done by the court below.

The actual existence of $10,000 in controversy cannot be disputed. "It is fundamental that in suits for equitable or declaratory relief 'the jurisdictional amount is to be tested by the value of the object to be gained by the complainant.'"

Economic Opportunity Comm. v. Weinberger, 524 F.2d 393, 408 (2d Cir. 1975), quoting from Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co. 239 U.S. 121 (1915). Whether, in the present case, that object is viewed as preserving plaintiffs' family integrity or obtaining the supportive services which they have so far been denied, its value easily surpasses the requisite amount.[19/]

This is especially so since plaintiffs' interest in family services is "common and undivided," and aggregation of their individual claims is therefore proper under the test announced in Snyder v. Harris, 394 U.S. 332 (1969). Such aggregation was expressly approved in Bass v. Rockefeller, 331 F. Supp. 945 (S.D.N.Y.), appeal dismissed as moot, 464 F.2d 1300 (2d Cir. 1971), a suit brought by medicaid recipients challenging a planned reduction in their benefits. The court in Bass stressed that defendants in that case had no interest whatsoever in how the claim was distributed among the various plaintiffs and that none of the plaintiffs could sue without "directly affecting the rights of his co-parties," 331 F. Supp. at 950. Each of these criteria is equally satisfied by the facts of the instant case.

There was thus no basis for the district court's decision declining jurisdiction and denying plaintiffs the opportunity to prove their statutory claims. On this ground alone, the case must be remanded.

19/ This Circuit has, moreover, repeatedly stressed that complaints should be dismissed "only when it is clear to a legal certainty that jurisdictional amounts cannot be met," Moore v. Betit, 511 F.2d 1004, 1006 (2d Cir. 1975).

POINT III

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' DUE PROCESS CLAIM TO SUPPORTIVE SERVICES WITHOUT UNDUE DELAY

Ms. Black, in the process of seeking aid for her children, has been repeatedly subject to a debilitating combination of intimidation and foot-dragging by defendant officials. As she and plaintiffs have discovered through personal experience, delay and harassment in the delivery of services can often be tantamount to outright denial. See Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 591 (1926). At times, the consequences may even be worse since uncertainty carries with it its own disabilities. Here, the stress it has caused, the personal appearances it has required and the interminable hearings it has occasioned, have all contributed in substantial part to Ms. Black's inability to retain her job. This pattern of conduct by public authorities constitutes a clear violation of the Due Process Clause.

In Nelson v. Sugarman, 361 F. Supp. 1132 (S.D.N.Y. 1972), an almost identical claim was held more than sufficient to withstand a motion to dismiss. Plaintiffs there brought suit under 42 U.S.C. §1983 contending that defendants' delay in implementing fair hearing decisions rose to the level of a constitutional violation. The court agreed, rejecting the argument that the Due Process Clause was triggered only by a termination of welfare benefits.

> the failure to provide assistance to... applicants who have been found to have insufficient means of support, is certainly as serious as the "total or substantial withdrawal of benefits from families living near the edge of subsistence." 361 F. Supp. at 1136.

Simliarly, the failure to provide supportive services to Ms. Black and her children, when they have sought and require them, is "as serious" as if those services had once been granted and then discontinued. In the latter case, due process would plainly be required; in the former instance it must be afforded as well.

Indeed, this was the conclusion of Perez v. Lavine, 378 F. Supp. 1390 (S.D.N.Y. 1974), an action complaining of bureaucratic incompetence and inadequate staffing at certain Bronx welfare centers. Referring, among other cases, to the holding in Nelson, the court stated: "there is respectable authority for the proposition that excessive administrative delay in the furnishing of services can rise to the denial of due process," 378 F. Supp. at 1394. See also Andujar v. Weinberger, 69 F.R.D. 690, 694 (S.D.N.Y. 1976).

Judge Pollack acknowledged and then distinguished this line of authority upon the ground that plaintiffs had failed to establish any statutory entitlement to the services in question. Cf. Board of Regents v. Roth, 408 U.S. 564 (1972). He reached this conclusion after citing a single Second Circuit decision[20/] for

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20/ Albany Welfare Rights Organization Day Care Center v. Schreck, 463 F. 2d 620, 624 (2d Cir. 1972), cert. denied, 410 U.S. 944 (1973). The issue in Schreck was whether local welfare officials could refuse to refer children to a particular day care center. The court did not purport to pass on whether the state could consistently with its obligation under AFDC completely deny all day care services.

the uncontested proposition that Congress intended AFDC to be primarily administered by state officials operating on the local level.

What Judge Pollack never considered, and in fact foreclosed by his unwillingness to exercise pendent jurisdiction, is whether any of the various provisions of the Social Security Act which plaintiffs have cited, see Point II, supra, grant them the right to the relief they seek. Until this threshold question is decided, it simply cannot be known whether or not, as plaintiffs contend, they are entitled under law to necessary supportive services. Judge Pollack's unsupported conclusion that no such entitlement exists is logically inconsistent and therefore unpersuasive.

These important and still unresolved issues can only be explored upon remand to the district court.

CONCLUSION

For all the reasons stated herein, the order of the district court dismissing plaintiffs' complaint should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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Of Counsel

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Attorney for Plaintiffs - Appellants
Randall Black, Greta Black, Joseph Black, Corrine Black, Kim Black, Janice Black, Nathaniel Black, Ulysses Black and Geraldine Black

"A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RANDALL BLACK, etc., et al.,

Plaintiffs,

-against-

ARTHUR LEVITT, etc., et al.,

Defendants.

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75 Civ. 3007 (EC)

AFFIDAVIT

State of New York)
: ss.
County of New York)

SARAH ZWIEBEL, being duly sworn, deposes and says:

1. I, Sarah Zwiebel, C.S.W., was asked by Morris Lavity and Peter Dienstag, lawyers for the Black children, to meet with the Black family in order to evaluate what the provision of services could 1) help prevent the need for foster care/institutional placement of the Black children and 2) enable the family to reintegrate those of the Black children already in foster care/institutional placement. It is my assessment that the provision of a variety of intensive supportive and concrete services could help achieve both of the above goals.

2. I am a New York State Certified Social Worker (License #012385) currently employed by Adelphi University School of Social Work as an Assistant Professor. My assignment this past year has been to train a unit of undergraduate and graduate students placed in social work interns in the Adelphi University School of Social Work Long Beach Family Center. This Family Center was developed as a result of a sub-contract grant from Nassau County Department of Social Services to service those families referred by Nassau County Protective Services after allegations of

of child abuse or maltreatment had been "found.d" by that agency. Prior to my employment at Adelphi University, I worked as a Psychiatric Social Worker at Brookdale and Hillside Hospitals, and as an Assistant to the Commissioner of Special Servicesfor Children for Community Based Services where it was my responsibility to work with child care agencies and community groups in an effort to develop placement prevention programs as well as community based placement facilities.

3. I met with Mrs. Frances Black on two separate occasions -once in my office and the second time in her house - for a total of four hours. When I visited the Black house (826 Columbus Ave. Apt. 10H) I also met Kim, Janice, Corrine, Greta, Ulysses, and Geraldine, six of her children and Kevin and Patricia, two of her grandchildren. Mrs. Black lives with six of her children and two of her grandchildren in a six room apartment which is woefully inadequate to meet the family's needs. The sixth room is a corridor kitchen which means that the living room, which is furnished with two b. ken couches (springs, stuffing and wood frame exposed) and a coffee table balanced on wooden blocks, also serves as the family's dining room. The four bedrooms have a total of four mattresses (two double sized and two single sized) on the floor and a third broken couch (as per above). There are three chests of drawers which are also broken. Mrs. Black has four children in placement at the Mission of the Immaculate Virgin, and they visit with the family on weekends adding to the already overcrowded conditions in the apartment.

4. During my visit with the family I observed a great deal of affection and warmth that seemed both genuine and shared between the members of the family. The children are appealing, attractive and engaging. The older daughters, Kim and Janice, shared in the child care responsibilities and in the household chores. All of the children and both

grandchildren interacted well with each other and with Mrs. Black. While the older children and Mrs. Black all display good senses of humor, they become quietly skeptical when the conversation turns to what efforts would help them improve their situation - it has been years now that they have been promised help and their attitude at this point is "seeing is believing".

5. Mrs. Black is a 39 year old woman who suffers from asthma and hypertension. The enormous difficulties and frustrations she has had in negotiating the various bureaucracies on which she has to depend for the survival of her family have exacerbated her symptoms and perpetuate a cycle of anger, action, frustration, illness, and then feeling too overwhelmed and defeated to do much of anything until the next burst of energy is necessitated by her not receiving her rent money or the like.

6. In my opinion the following sequence of services is needed by the family and would enable them to significantly improve the quality of their lives.

a. Assignment to the family of a social worker (B.S.W. - salary per annum $9,000) on a 3 day per week basis. This worker should be a warm and mature person capable of forming positive and nurturing professional relationships with clients. She should have at her disposal a car, and her first priority ought to be to accompany Mrs. Black in an effort to locate a house large enough for all the members of the family - including those in placement. Once that were accomplished, the worker would need to spend the significant amount of time it takes (with Mrs. Black) to receive from the Department of Social Services, the approval to rent and the money to rent the house. If the house is not furnished, she would then need to help Mrs. Black get the funds necessary to purchase adequate furniture for the Black family. Hopefully, the Department of Social Services could be prevailed upon to supply funds for this purpose.

b. Once the house is rented and furnished the members of the Black family currently residing at 826

Columbus Avenue could be moved into their new house. At this point the social worker could help Mrs. Black register all of the children in school - arranging for the transfer of records and the testing of the children so that the appropriate educational placements could be made. The worker could also help see to it that all of the members of the family are registered in the appropriate health clinics in their new neighborhood and that they all receive the health care they need. The children should also be registered in local recreational services. Day care services should be obtained for Kevin. A homemaker should be assigned the family to help them set and maintain good homemaking standards during their first months in their new home.

c. Once the family is settled in their new home, the children enrolled in local schools, health facilities, and recreational facilities, the four children at the Mission of the Immaculate Virgin could be returned to their family and the social worker could then help Mrs. Black register these children, with the cooperation of MIV, in appropriate schools, health clinics, and recreational facilities.

d. Once all of the above were done, Mrs. Black may feel able to seek employment to help support her family. The older daughters too could work to help support the family if adequate child care services were provided.

e. The social worker would therefore be providing the support necessary for Mrs. Black to negotiate the many systems that impinge on her life and enable her to receive the concrete services needed to help her improve the quality of her family's life. The execution of the above

plan would also depend on the cooperation of the Department of Social Services, the Bureau of Child Welfare, the Missio. of the Immaculate Virgin, Homemaker Services, the Board of Education, Day Care Services and Health Services.

7. As stated above, for the past year I have been training undergraduate and graduate students of the Adelphi University School of Social Work to work with families that are known to Nassau County Protective Services. The families with whom we have worked are all overwhelmed in a variety of ways but have been able to mobilize themselves signnigicantly with the help of a nurturing and understanding worker who addresses herself to helping the family get that which it deserves for itself, and advocates on their behalf with the many bureaucratic systems on which they are dependent. The placement of their children into foster care has in this way usually been prevented.

8. I discussed the above plan with Mrs. Black and her children. Mrs. Black agreed that this is what would be helpful to her. The children's response - as stated above - was somewhat sobering - "It sounds too good to be true, when I see it is when I'll believe it" said Kim. When one considers how inexpensive all of the above would be in comparison to the cost of foster care for the children currently in placement, one can only be dismayed that no such plan was effected years ago.

SARAH ZWIBEL

Sworn to before me this 3rd
day of April, 1976

Peter Bernstein

NOTARY PUBLIC

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
) ss.:
County of New York)

AUDREY P. SENIORS being duly sworn, deposes and says that s/he is over the age of eighteen years, is not a party to this action, and resides at 84 Fifth Avenue, New York, New York, 10011, and that on the 19 day of November , 1976, s/he served the annexed Brief and Joint Appendix

upon Jean Hollingsworth
New York City Housing Authority

Alfred Schretter
Davis Polk & Wardwell

Mark Rutzick
New York State Attorney General's Office

Caroline Demerest
Assistant Corporation Counsel

attorney(s) for Defendants

by depositing a true copy thereof enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Audrey P. Seniors
AUDREY P. SENIORS

Sworn to before me this
19 day of Nov. , 1976

Marcia Robinson Lowry
NOTARY PUBLIC

MARCIA ROBINSON LOWRY
Notary Public, State of New York
Qualified in [illegible]
Commission Expires [illegible]

8

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is

Check Applicable Box

☐ Individual Verification the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a

entered in the office of the clerk of the within ed court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No. 76-7478 Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RANDALL BLACK, et al.,

Plaintiffs,

-against-

ABRAHAM BEAME, et al.,

Defendants.

AFFIDAVIT OF SERVICE

Marcia Robinson Lowry
Attorney for Plaintiffs-Appellants

Office and Post Office Address, Telephone

Children's Rights Project
New York Civil Liberties Union
84 Fifth Avenue, NYC 10011
(212) 924-7800

To

Attorney(s) for

Service of a copy of the within

is hereby admitted

Dated,

Attorney(s) for